



FEDERAL LABOR RELATIONS AUTHORITY

5 CFR Part 2411

Availability of Official Information

AGENCY: Federal Labor Relations Authority.

ACTION: Final rule.

SUMMARY: This rulemaking amends the regulations that the Federal Labor Relations Authority (FLRA) follows in processing records under the Freedom of Information Act (FOIA) to comply with the FOIA Improvement Act of 2016. The amendments would clarify and update procedures for requesting information from the FLRA and procedures that the FLRA follows in responding to requests from the public.

DATES: Effective January 24, 2017.

FOR FURTHER INFORMATION CONTACT: If you have any comments or questions, please contact Fred B. Jacob, Solicitor, Chief FOIA Officer, Federal Labor Relations Authority, 1400 K Street, NW., Washington, DC 20424; (202) 218-7999; fax: (202) 343-1007; or e-mail: solmail@flra.gov.

SUPPLEMENTARY INFORMATION: On June 30, 2016, President Obama signed into law the FOIA Improvement Act of 2016. The Act specifically requires all agencies to review and update their FOIA regulations in accordance with its provisions, and the FLRA is making changes to its regulations accordingly. Among other things, the Act addresses a range of procedural issues that affect agency FOIA regulations, including requirements that agencies establish a minimum of 90 days for requesters to file an administrative appeal and that they provide dispute-resolution services at various times throughout the FOIA process. In addition to some minor non-substantive changes to

correct typographical errors, make small stylistic adjustments for clarification, and streamline the language of some procedural provisions, the FLRA is making the following changes:

- Section 2411.4 is amended to emphasize the ability to view records electronically on the FLRA's website. Because all of the FLRA's disclosable records under 5 U.S.C. 552(a)(2) are available on the FLRA's website, section 2411.4 is also amended to eliminate the procedure for requesting use of a computer terminal at the FLRA's headquarters or one of its regional offices. Finally, section 2411.4 is amended to reflect the requirement under the FOIA Improvement Act of 2016 that agencies make available for public inspection, in electronic format, records that have been requested three or more times.
- Section 2411.6 is amended to notify requesters that they may contact the FLRA's Chief FOIA Officer or FOIA Public Liaison to discuss and to receive assistance in processing records requests. This section also updates the information that is listed in the agency's public FOIA logs to include, among other things, whether any exemptions were applied in processing a request. The section additionally describes the agency's consultation, referral, and coordination efforts with other agencies in processing FOIA requests.
- Section 2411.7 is amended to describe that the agency will inform a requester of the availability of the FLRA's FOIA Public Liaison to assist in processing his or her request.
- Section 2411.8 describes the time limits for processing FOIA requests and provides instances in which fees will not be assessed if an agency component fails

to comply with deadlines listed in 5 U.S.C. 552(a)(4)(A). The section is amended to further describe exceptions under this rule, including, for instance, when unusual circumstances are present and when large numbers of documents are necessary to respond to the request. This section is also amended to explain that in the case of a denial, the agency will notify the requester of additional assistance that is available, specifically from the FLRA's FOIA Public Liaison and the Office of Government Information Services (OGIS).

- Section 2411.10, describing how a requester can appeal a denied request, is amended to provide the requester with 90 calendar days to appeal. This section also now notifies a requester of the dispute-resolution services offered by OGIS.
- Section 2411.11 is amended to again notify requesters of the availability of OGIS and its dispute-resolution services.
- Section 2411.12 is amended to state that no search or review fees will be charged for a quarter-hour period unless more than half of that period is required for search or review. This section is also amended to elaborate on how a requester may submit a fee waiver, as well as to describe the obligations on the requester when a fee waiver is denied. Additionally, the section is amended to explain the consequences of failing to pay fees, such as the agency closing the matter without further processing the request.
- Section 2411.15 is amended to incorporate the additional reporting requirements related to the agency's FOIA annual report, including that the report will provide raw statistical data to the public.

This rule is internal and procedural rather than substantive. It does not create a right to obtain FLRA records, nor does it create any additional right or privilege not already available to the public as a result of the FOIA Improvement Act of 2016. It merely adopts the improvements mandated in the Act and builds upon the previous agency procedures for processing FOIA-related requests.

Regulatory Flexibility Act Certification

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), the FLRA has determined that this regulation, as amended, will not have a significant impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This rule change will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This action is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Paperwork Reduction Act of 1995

The amended regulations contain no additional information-collection or record-keeping requirements under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, *et seq.*

Public Participation

This rule is published as a final rule. It is exempt from public comment, pursuant to 5 U.S.C. 553(b)(A), as a rule of “agency organization, procedure, or practice.” If you wish to contact the agency, please do so at the above listed address. However, before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

List of Subjects in 5 CFR part 2411

Freedom of Information Act.

For the reasons stated in the preamble, the Authority amends 5 CFR part 2411 as follows:

PART 2411—AVAILABILITY OF OFFICIAL INFORMATION

1. The authority citation for part 2411 is revised to read as follows:

Authority: 5 U.S.C. 552, as amended; Freedom of Information Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 528; Openness Promotes Effectiveness in our National Government Act of 2007 (OPEN Government Act), Pub. L. No. 110-175, 121 Stat. 2524.

2. Revise § 2411.1 to read as follows:

§ 2411.1 Purpose.

This part contains the rules that the Federal Labor Relations Authority (FLRA), including the three-Member Authority component (Authority), the General Counsel of the FLRA (General Counsel), the Federal Service Impasses Panel (Panel), and the Inspector General of the FLRA (IG), follow in processing requests for information under the Freedom of Information Act, as amended, 5 U.S.C. 552 (FOIA). These regulations should be read in conjunction with the text of the FOIA and the Uniform Freedom of Information Fee Schedule and Guidelines published by the Office of Management and Budget. Requests by individuals for records about themselves under the Privacy Act of 1974, 5 U.S.C. 552a, are processed in accordance with the Authority's Privacy Act regulations, *see* 5 CFR part 2412, as well as under this subpart.

3. Revise § 2411.2 to read as follows:

§ 2411.2 Scope.

(a) For the purpose of this part, the term record and any other term used in reference to information includes any information that would be subject to the requirements of 5 U.S.C. 552 when maintained by the Authority, the General Counsel, the Panel, or the IG in any format, including an electronic format. All written requests for information from the public that are not processed under parts 2412 and 2417 of this chapter will be processed under this part. The Authority, the General Counsel, the Panel, and the IG may each continue, regardless of this part, to furnish the public with the information that it has furnished in the regular course of performing its official duties, unless furnishing the information would violate the Privacy Act of 1974, 5 U.S.C. 552a, or another law.

(b) When the subject of a record, or the subject's representative, requests the record from a Privacy Act system of records, as that term is defined by 5 U.S.C. 552a(a)(5), and the FLRA retrieves the record by the subject's name or other personal identifier, the FLRA will handle the request under the procedures and subject to the fees set out in part 2412. When a third party requests access to those records, without the written consent of the subject of the record, the FLRA will process the request under this part.

(c) Nothing in 5 U.S.C. 552 or this part requires that the Authority, the General Counsel, the Panel, or the IG, as appropriate, create a new record in order to respond to a request for the records.

4. Revise § 2411.3 to read as follows:

§ 2411.3 Delegation of authority.

(a) Chief FOIA Officer. The Chairman of the FLRA designates the Chief FOIA Officer, who has agency-wide responsibility for the efficient and appropriate compliance with the FOIA. The Chief FOIA Officer monitors the implementation of the FOIA throughout the agency.

(b) Authority/General Counsel/Panel/IG. Regional Directors of the Authority, the FOIA Officer of the Office of the General Counsel, Washington, DC, the Solicitor of the Authority, the Executive Director of the Panel, and the IG are delegated the exclusive authority to act upon all requests for information, documents, and records that are received from any person or organization under § 2411.5(a) and (b).

(c) FOIA Public Liaison(s). The Chief FOIA Officer shall designate the FOIA Public Liaison(s), who shall serve as the supervisory official(s) to whom a FOIA

requester can raise concerns about the service that the FOIA requester has received following an initial response.

5. Amend § 2411.4 by revising paragraphs (a) through (c) and (e) and (f) to read as follows:

§ 2411.4 Information policy.

(a)(1) It is the policy of the Authority, the General Counsel, the Panel, and the IG to make available for public inspection in an electronic format:

(i) Final decisions and orders of the Authority and administrative rulings of the General Counsel; procedural determinations, final decisions and orders of the Panel; factfinding and arbitration reports; and reports and executive summaries of the IG;

(ii) Statements of policy and interpretations that have been adopted by the Authority, the General Counsel, the Panel, or the IG and that are not published in the Federal Register;

(iii) Administrative staff manuals and instructions to staff that affect a member of the public (except those establishing internal operating rules, guidelines, and procedures for the investigation, trial, and settlement of cases);

(iv) Copies of all records, regardless of form or format, that have been released to any person under 5 U.S.C. 552(a)(3) and that:

(A) Because of the nature of their subject matter, the Authority, the General Counsel, the Panel, or the IG determines have become, or are likely to become, the subject of subsequent requests for substantially the same records; or

(B) Have been requested three or more times; and

(v) A general index of the records referred to in paragraph (a)(i) - (iv) of this section.

(2) It is the policy of the Authority, the General Counsel, the Panel, and the IG to make promptly available for public inspection in an electronic format, upon request by any person, other records where the request reasonably describes such records and otherwise conforms to the procedures of this part.

(b)(1) Any person may examine and copy items in paragraphs (a)(1)(i) through (iv) of this section, at each regional office of the Authority and at the offices of the Authority, the General Counsel, the Panel, and the IG, respectively, in Washington, DC, under conditions prescribed by the Authority, the General Counsel, the Panel, and the IG, respectively, and at reasonable times during normal working hours, so long as it does not interfere with the efficient operations of the Authority, the General Counsel, the Panel, or the IG. To the extent required to prevent a clearly unwarranted invasion of personal privacy, identifying details may be deleted and, in each case, the justification for the deletion shall be fully explained in writing. On the released portion of the record, the amount of information deleted, and the exemption under which the deletion is made, shall be indicated unless an interest protected by the exemption would be harmed.

(2) All records covered by this section are available on the FLRA's website (<https://www.flra.gov/elibrary>).

(c) The Authority, the General Counsel, the Panel, and the IG shall maintain and make available for public inspection in an electronic format the current indexes and supplements to the records that are required by 5 U.S.C. 552(a)(2) and, as appropriate, a record of the final votes of each Member of the Authority and of the Panel in every

agency proceeding. Any person may examine and copy such document or record of the Authority, the General Counsel, the Panel, or the IG at the offices of either the Authority, the General Counsel, the Panel, or the IG, as appropriate, in Washington, DC, under conditions prescribed by the Authority, the General Counsel, the Panel, or the IG at reasonable times during normal working hours, so long as it does not interfere with the efficient operations of the Authority, the General Counsel, the Panel, or the IG.

(e)(1) The formal documents constituting the record in a case or proceeding are matters of official record and, until destroyed pursuant to applicable statutory authority, are available to the public for inspection and copying at the appropriate regional office of the Authority, or the offices of the Authority, the General Counsel, the Panel, or the IG in Washington, DC, as appropriate, under conditions prescribed by the Authority, the General Counsel, the Panel, or the IG at reasonable times during normal working hours so long as it does not interfere with the efficient operations of the Authority, the General Counsel, the Panel, or the IG.

(2) The Authority, the General Counsel, the Panel, or the IG, as appropriate, shall certify copies of the formal documents upon request made a reasonable time in advance of need and payment of lawfully prescribed costs.

(f)(1) Copies of forms prescribed by the General Counsel for the filing of charges and petitions may be obtained without charge from any regional office of the Authority or on the Authority's website at: <https://www.flra.gov/resources-training/resources/forms-checklists>.

(2) Copies of forms prescribed by the Panel for the filing of requests may be obtained without charge from the Panel's offices in Washington, DC or on the Authority's website at: <https://www.flra.gov/resources-training/resources/forms-checklists>.

(3) Copies of optional forms for filing exceptions or appeals with the Authority may be obtained without charge from the Office of Case Intake and Publication at the Authority's offices in Washington, DC or on the Authority's website at: <https://www.flra.gov/resources-training/resources/forms-checklists>.

6. Revise § 2411.5 to read as follows:

§ 2411.5 Procedure for obtaining information.

(a) Any person who desires to inspect or copy any records, documents, or other information of the Authority, the General Counsel, the Panel, or the IG, covered by this part, other than those specified in § 2411.4(a)(1) and (c), shall submit an electronic written request via the FOIAOnline system at <https://foiaonline.regulations.gov> or a written, facsimiled, or email request (*see* office and email addresses listed at https://www.flra.gov/foia_contact and in Appendix A to 5 CFR Chapter XIV) as follows:

- (1) If the request is for records, documents, or other information in a regional office of the Authority, it should be made to the appropriate Regional Director;
- (2) If the request is for records, documents, or other information in the Office of the General Counsel and located in Washington, DC, it should be made to the FOIA Officer, Office of the General Counsel, Washington, DC;
- (3) If the request is for records, documents, or other information in the offices of the Authority in Washington, DC, it should be made to the Solicitor of the Authority, Washington, DC;
- (4) If the request is for records, documents, or other information in the offices of the Panel in Washington, DC, it should be made to the Executive Director of the Panel, Washington, DC; and
- (5) If the request is for records, documents or other information in the offices of the IG in Washington, DC, it should be made to the IG, Washington, DC.

(b) Each request under this part should be clearly and prominently identified as a request for information under the FOIA and, if submitted by mail or otherwise submitted in an envelope or other cover, should be clearly identified as such on the envelope or other cover. A request shall be considered an agreement by the requester to pay all applicable fees charged under § 2411.13, up to \$25.00, unless the requester seeks a waiver of fees. When making a request, the requester may specify a willingness to pay a greater or lesser amount. Fee charges will be assessed for the full allowable direct costs of document search, review, and duplication, as appropriate, in accordance with § 2411.13. If a request does not comply with the provisions of this paragraph, it shall not be deemed received by the appropriate Regional Director, the FOIA Officer of the General Counsel, the Solicitor of the Authority, the Executive Director of the Panel, or the IG, as appropriate.

7. Revise § 2411.6 to read as follows:

§ 2411.6 Identification of information requested.

(a) *Reasonably describe and identify records.* Each request under this part shall reasonably describe the records being sought in a way that the FLRA can be identify and locate them. A request shall be legible and include all pertinent details that will help identify the records sought. Before submitting a request, a requester may contact the FLRA's Chief FOIA Officer or FOIA Public Liaison to discuss the records that he or she seeks and to receive assistance in describing the records.

(b) *Agency efforts to further identify records.* If the description does not meet the requirements of paragraph (a) of this section, the officer processing the request shall so notify the person making the request and indicate the additional information needed.

Every reasonable effort shall be made to assist in the identification and location of the records sought. A requester who is attempting to reformulate or modify his or her request may discuss the request with the FLRA's Chief FOIA Officer or FOIA Public Liaison.

(c) *Public logs.* Upon receipt of a request for records, the appropriate Regional Director, the FOIA Officer of the General Counsel, the Solicitor of the Authority, the Executive Director of the Panel, or the IG, as appropriate, shall enter it in a public log. The log shall state: the request number; the date received; the nature of the records requested; the action taken on the request; the agency's response date; any exemptions that were applied (if applicable) and their descriptions; and whether any fees were charged for processing the request.

(d) *Consultation, referral, and coordination.* When reviewing records located in response to a request, the Authority, the General Counsel, the Panel, or the IG will determine whether another agency of the Federal Government is better able to determine whether the record is exempt from disclosure under the FOIA. As to any such record, the Authority, the General Counsel, the Panel, or the IG will proceed in one of the following ways:

(1) *Consultation.* When records originated with the Authority, the General Counsel, the Panel, or the IG, but contain within them information of interest to another agency or other Federal Government component, the Authority, the General Counsel, the Panel, or the IG will typically consult with that other entity prior to making a release determination.

(2) *Referral.* (i) When the Authority, the General Counsel, the Panel, or the IG believes that a different agency or component is best able to determine

whether to disclose the record, the Authority, the General Counsel, the Panel, or the IG will typically refer the responsibility for responding to the request regarding that record to that agency or component. Ordinarily, the agency or component that originated the record is presumed to be the best agency or component to make the disclosure determination. However, if the FLRA and the originating agency or component jointly agree that the FLRA is in the best position to respond regarding the record, then the record may be handled as a consultation.

(ii) Whenever the Authority, the General Counsel, the Panel, or the IG refers any part of the responsibility for responding to a request to another Federal agency, it must document the referral, maintain a copy of the record that it refers, and notify the requester of the referral, informing the requester of the name(s) of the agency to which the record was referred, including that agency's FOIA contact information.

(3) *Coordination.* The standard referral procedure is not appropriate where disclosure of the identity of the agency to which the referral would be made could harm an interest protected by an applicable exemption, such as the exemptions that protect personal privacy or national-security interests. In such instances, in order to avoid harm to an interest protected by an applicable exemption, the Authority, the General Counsel, the Panel, or the IG should coordinate with the originating agency to seek its views on the disclosability of the record. The release determination for the record that is the subject of the

coordination should then be conveyed to the requester by the Authority, the General Counsel, the Panel, or the IG.

8. Revise § 2411.7 to read as follows:

§ 2411.7 Format of disclosure.

(a) After a determination has been made to grant a request in whole or in part, the appropriate Regional Director, the FOIA Officer of the General Counsel, the Solicitor of the Authority, the Executive Director of the Panel, or the IG, as appropriate, will notify the requester in writing. The notice will describe the manner in which the record will be disclosed and will inform the requester of the availability of the Authority's FOIA Public Liaison to offer assistance. The appropriate Regional Director, the FOIA Officer of the General Counsel, the Solicitor of the Authority, the Executive Director of the Panel, or the IG, as appropriate, will provide the record in the form or format requested if the record is readily reproducible in that form or format, provided the requester has agreed to pay and/or has paid any fees required by § 2411.13 of this part. The appropriate Regional Director, the FOIA Officer of the General Counsel, the Solicitor of the Authority, the Executive Director of the Panel, or the IG, as appropriate, will determine on a case-by-case basis what constitutes a readily reproducible format. These offices will make a reasonable effort to maintain their records in commonly reproducible forms or formats.

(b) Alternatively, the appropriate Regional Director, the FOIA Officer of the General Counsel, the Solicitor of the Authority, the Executive Director of the Panel, or the IG, as appropriate, may make a copy of the releasable portions of the record available to the requester for inspection at a reasonable time and place. The procedure for such an inspection will not unreasonably disrupt the operations of the office.

9. Amend § 2411.8 by revising paragraphs (a) introductory text, (b), (c) introductory text, (c)(1) and (2), (c)(5), (d), and (e) to read as follows:

§ 2411.8 Time limits for processing requests.

(a) The 20-day period (excepting Saturdays, Sundays, and legal public holidays), established in this section, shall commence on the date on which the request is first received by the appropriate component of the agency (Regional Director, the FOIA Officer of the Office of the General Counsel, the Solicitor of the Authority, the Executive Director of the Panel, or the IG), but in any event not later than 10 days after the request is first received by any FLRA component responsible for receiving FOIA requests under part 2411. The 20-day period does not run when:

(b) A request for records shall be logged in by the appropriate Regional Director, the FOIA Officer of the General Counsel, the Solicitor of the Authority, the Executive Director of the Panel, or the IG, as appropriate, pursuant to § 2411.6(c). All requesters must reasonably describe the records sought. An oral request for records shall not begin any time requirement. A written request for records sent to other than the appropriate officer will be forwarded to that officer by the receiving officer, but, in that event, the applicable time limit for response shall begin as set forth in paragraph (a) of this section.

(c) Except as provided in § 2411.11, the appropriate Regional Director, the FOIA Officer of the General Counsel, the Solicitor of the Authority, the Executive Director of the Panel, or the IG, as appropriate, shall, within 20 working days following receipt of the request, as provided by paragraph (a) of this section, respond in writing to the requester, determining whether, or the extent to which, the request shall be complied with.

(1) If all of the records requested have been located, and a final determination has been made with respect to disclosure of all of the records requested, the response shall so state.

(2) If all of the records have not been located, or a final determination has not been made with respect to disclosure of all of the records requested, the response shall state the extent to which the records involved shall be disclosed pursuant to the rules established in this part.

* * * * *

(5) Search fees shall not be assessed to requesters (or duplication fees in the case of an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media requester, as defined by § 2411.13(a)(8)) under this subparagraph if an agency component fails to comply with any of the deadlines in 5 U.S.C. 552(a)(4)(A), except as provided in the following paragraphs (c)(5)(i) through (iii):

(i) If the Authority, the General Counsel, the Panel, or the IG has determined that unusual circumstances apply (as the term is defined in § 2411.11(b)) and the Authority, the General Counsel, the Panel, or the IG provided a timely written notice to the requester in accordance with § 2411.11(a), a failure described in this paragraph (c)(5) is excused for an additional 10 days. If the Authority, the General Counsel, the Panel, or the IG fails to comply with the extended time limit, the Authority, the General Counsel, the Panel, or the IG may not assess any search fees (or, in the case of a requester described in § 2411.13(a)(8), duplication fees).

(ii) If the Authority, the General Counsel, the Panel, or the IG determines that unusual circumstances apply and more than 5,000 pages are necessary to respond to the request, the Authority, the General Counsel, the Panel, or the IG may charge search fees or, in the case of requesters defined in § 2411.13(a)(6) through (8), may charge duplication fees, if the following steps are taken. The Authority, the General Counsel, the Panel, or the IG must have provided timely written notice of unusual circumstances to the requester in accordance with the FOIA and must have discussed with the requester via written mail, e-mail, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with 5 U.S.C. 552(a)(6)(B)(ii). If this exception is satisfied, the Authority, the General Counsel, the Panel, or the IG may charge all applicable fees incurred in the processing of the request.

(iii) If a court has determined that exceptional circumstances exist, as defined by the FOIA, a failure to comply with the time limits shall be excused for the length of time provided by the court order.

(d) If a request will take longer than 10 days to process:

(1) An individualized tracking number will be assigned to the request and provided to the requester; and

(2) Using the tracking number, the requester can find, by calling 202-218-7999 or visiting <https://foiaonline.regulations.gov>, status information about the request including:

(i) The date on which the agency originally received the request; and

(ii) An estimated date on which the agency will complete action on the request.

(e) If any request for records is denied in whole or in part, the response required by paragraph (c) of this section shall notify the requester of the denial. Such denial shall specify the reason therefore, set forth the name and title or position of the person responsible for the denial, and notify the person making the request of the right to appeal the denial under the provisions of § 2411.10. Such denial shall also notify the requester of the assistance available from the FLRA's FOIA Public Liaison and the dispute resolution services offered by the Office of Government Information Services of the National Archives and Records Administration (OGIS).

10. Amend § 2411.9 by revising paragraphs (a), (b), (d), (e)(2), (f), (g) introductory text, (h)(1), (3), and (4), (i), and (j) to read as follows:

§ 2411.9 Business information.

(a) *In general.* Business information obtained by the FLRA from a submitter will be disclosed under the FOIA only under this section.

(b) *Definitions.* For purposes of this section:

(1) Business information means commercial or financial information obtained by the FLRA from a submitter that may be protected from disclosure under Exemption 4 of the FOIA.

(2) Submitter means any person or entity from whom the FLRA obtains business information, directly or indirectly. The term includes corporations; state, local, and tribal governments; and foreign governments.

(d) Notice to submitters. The FLRA shall provide a submitter with prompt written notice of a FOIA request or administrative appeal that seeks its business information

wherever required under paragraph (e) of this section, except as provided in paragraph (h) of this section, in order to give the submitter an opportunity to object to disclosure of any specified portion of that information under paragraph (f) of this section. The notice shall either describe the business information requested or include copies of the requested records or record portions containing the information. When notification of a voluminous number of submitters is required, notification may be made by posting or publishing the notice in a place reasonably likely to accomplish it.

(e) ***

(2) The FLRA has reason to believe that the information may be protected from disclosure under Exemption 4.

(f) Opportunity to object to disclosure. The FLRA will allow a submitter a reasonable time to respond to the notice described in paragraph (d) of this section and will specify that time period within the notice. If a submitter has any objection to disclosure, it is required to submit a detailed written statement. The statement must specify all grounds for withholding any portion of the information under any exemption of the FOIA and, in the case of Exemption 4, it must show why the information is a trade secret or commercial or financial information that is privileged or confidential. In the event that a submitter fails to respond to the notice within the time specified in it, the submitter will be considered to have no objection to disclosure of the information. Information provided by the submitter that is not received by the FLRA until after it has made its disclosure decision shall not be considered by the FLRA. Information provided by a submitter under this paragraph may itself be subject to disclosure under the FOIA.

(g) Notice of intent to disclose. The FLRA shall consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose business information. Whenever the FLRA decides to disclose business information over the objection of a submitter, the FLRA shall give the submitter written notice, which shall include:

(h) ***

(1) The FLRA determines that the information should not be disclosed;

(3) Disclosure of the information is required by statute (other than the FOIA) or by a regulation issued in accordance with the requirements of Executive Order 12600, (52 FR 23781, 3 CFR, 1987 Comp. p. 235); or

(4) The designation made by the submitter under paragraph (c) of this section appears to be obviously frivolous – except that, in such a case, the FLRA shall, within a reasonable time prior to a specified disclosure date, give the submitter written notice of any final decision to disclose the information.

(i) Notice of FOIA lawsuit. Whenever a requester files a lawsuit seeking to compel the disclosure of business information, the FLRA shall promptly notify the submitter.

(j) Corresponding notice to requesters. Whenever the FLRA provides a submitter with notice and an opportunity to object to disclosure under paragraph (d) of this section, the FLRA shall also notify the requester(s). Whenever the FLRA notifies a submitter of its intent to disclose requested information under paragraph (g) of this section, the FLRA

shall also notify the requester(s). Whenever a submitter files a lawsuit seeking to prevent the disclosure of business information, the FLRA shall notify the requester(s).

11. Revise § 2411.10 to read as follows:

§ 2411.10 Appeal from denial of request.

(a)(1) When a request for records is denied, in whole or in part, a requester may appeal the denial by submitting a written appeal by mail or online that is postmarked, or in the case of an electronic submission, transmitted, within 90 calendar days after the requester receives notification that the request has been denied or after the requester receives any records being made available, in the event of partial denial. The appeal should clearly identify the agency determination that is being appealed and the assigned request number.

(i) If the denial was made by the Solicitor or the IG, the appeal shall be filed with the Chairman of the Authority in Washington, DC.

(ii) If the denial was made by a Regional Director or by the FOIA Officer of the General Counsel, the appeal shall be filed with the General Counsel in Washington, DC.

(iii) If the denial was made by the Executive Director of the Panel, the appeal shall be filed with the Chairman of the Panel.

(2) The Chairman of the Authority, the General Counsel, or the Chairman of the Panel, as appropriate, shall, within 20 working days (excepting Saturdays, Sundays, and legal public holidays) from the time of receipt of the appeal, except as provided in § 2411.11, make a determination on the appeal and respond in writing to the requester, determining whether, or the extent to which, the request shall be granted. An appeal ordinarily will not be adjudicated if the request becomes a matter of FOIA litigation.

(i) If the determination is to grant the request and the request is expected to involve an assessed fee in excess of \$250.00, the determination shall specify or estimate the fee involved, and it shall require prepayment of any charges due in accordance with the provisions of § 2411.13(a) before the records are made available.

(ii) Whenever possible, the determination relating to a request for records that involves a fee of less than \$250.00 shall be accompanied by the requested records when there is no history of the requester having previously failed to pay fees in a timely manner. Where this is not possible, the records shall be forwarded as soon as possible thereafter, consistent with other obligations of the Authority, the General Counsel, the Panel, or the IG.

(b) If, on appeal, the denial of the request for records is upheld in whole or in part by the Chairman of the Authority, the General Counsel, or the Chairman of the Panel, as appropriate, the person making the request shall be notified of the reasons for the determination, the name and title or position of the person responsible for the denial, and the provisions for judicial review of that determination under 5 U.S.C. 552(a)(4). The determination will also inform the requester of the mediation services offered by the OGIS as a non-exclusive alternative to litigation. Mediation is a voluntary process. If the FLRA agrees to participate in the mediation services provided by the OGIS, it will actively engage as a partner to the process in an attempt to resolve the dispute.

(c) Even though no appeal is filed from a denial in whole or in part of a request for records by the person making the request, the Chairman of the Authority, the General Counsel, or the Chairman of the Panel, as appropriate, may, without regard to the time limit for filing of an appeal, sua sponte initiate consideration of a denial under this appeal

procedure by written notification to the person making the request. In such event, the time limit for making the determination shall commence with the issuance of such notification.

(d) Before seeking judicial review of the FLRA's denial of a request, a requester generally must first submit a timely administrative appeal.

12. Revise § 2411.11 to read as follows:

§ 2411.11 Modification of time limits.

(a) In unusual circumstances, as specified in this section, the time limits prescribed with respect to initial determinations or determinations on appeal may be extended by written notice from the agency component handling the request (either initial or on appeal) to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. As appropriate, the notice shall provide the requester with an opportunity to limit the scope of the request so that it may be processed within the time limit or an opportunity to arrange with the processing agency component an alternative time frame for processing the request or a modified request. No such notice shall specify a date that would result in a total extension of more than 10 working days. To aid the requester, the FOIA Public Liaison shall assist in the resolution of any disputes between the requester and the processing agency component, and shall notify the requester of the requester's right to seek dispute resolution services from the OGIS.

(b) As used in this section, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request:

(1) The need to search for and collect the requested records from field facilities or other establishments that are separate from the processing agency component;

(2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request; or

(3) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.

(c) Expedited processing of a request for records, or an appeal of a denial of a request for expedited processing, shall be provided when the requester demonstrates a compelling need for the information and in other cases as determined by the officer processing the request. A requester seeking expedited processing can demonstrate a compelling need by submitting a statement certified by the requester to be true and correct to the best of such person's knowledge and belief and that satisfies the statutory and regulatory definitions of compelling need. Requesters shall be notified within 10 calendar days after receipt of such a request whether expedited processing, or an appeal of a denial of a request for expedited processing, was granted. As used in this section, "compelling need" means:

(1) That a failure to obtain requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(2) With respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

13. Revise § 2411.12 to read as follows:

§ 2411.12 Effect of failure to meet time limits.

Failure by the Authority, the General Counsel, the Panel, or the IG either to deny or grant any request under this part within the time limits prescribed by the FOIA, as amended and these regulations shall be deemed to be an exhaustion of the administrative remedies available to the person making this request.

14. Amend § 2411.13 by revising paragraphs (a)(1), (a)(3) through (8), (b), (c)(2) through (4), (d)(2) through (5), (e) through (h), and adding paragraph (j) to read as follows:

§ 2411.13 Fees.

(a) ***

(1) The term *direct costs* means those expenditures that the Authority, the General Counsel, the Panel, or the IG actually incurs in searching for and duplicating (and in the case of commercial requesters, reviewing) documents to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing work (the basic rate of pay for the employee plus 16 percent of the rate to cover benefits) and the cost of operating duplication machinery. Not included in direct costs are overhead expenses such as costs of space, and heating or lighting the facility in which the records are stored.

(3) The term *duplication* refers to the process of making a copy of a document necessary to respond to a FOIA request. Such copies can take the form of paper copy, audio-visual materials, or machine-readable documentation, among others.

(4) The term *review* refers to the process of examining documents located in response to a commercial-use request (see paragraph (a)(5) of this section) to determine whether any portion of any document located is permitted to be withheld. It also includes processing any documents for disclosure, e.g., doing all that is necessary to prepare them for release. Review does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(5) The term *commercial-use request* refers to a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made. In determining whether a requester properly belongs in this category, the Authority, the General Counsel, the Panel, or the IG will look first to the use to which a requester will put the document requested. Where the Authority, the General Counsel, the Panel, or the IG has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, the Authority, the General Counsel, the Panel, or the IG may seek additional clarification before assigning the request to a specific category.

(6) The term *educational institution* refers to a preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of

professional education, or an institution of vocational education that operates a program or programs of scholarly research.

(7) The term *non-commercial scientific institution* refers to an institution that is not operated on a commercial basis as that term is referenced in paragraph (a)(5) of this section, and that is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

(8) The term *representative of the news media* refers to any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. The term *news* means information that is about current events or that would be of current interest to the public. Examples of news-media entities include television or radio stations broadcasting to the public at large and publishers of periodicals that disseminate “news” and make their products available through a variety of means to the general public including news organizations that disseminate solely on the Internet. These examples are not intended to be all-inclusive. Moreover, as methods of news delivery evolve, such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the FLRA may also

consider the past publication record of the requester in making such a determination.

(b) *Exceptions to fee charges.* (1) With the exception of requesters seeking documents for a commercial use, the Authority, the General Counsel, the Panel, or the IG will provide the first 100 pages of duplication and the first two hours of search time without charge. The word *pages* in this paragraph refers to paper copies of standard size, usually 8 1/2 by 11. The term *search time* in this paragraph is based on a manual search for records. In applying this term to searches made by computer, when the cost of the search as set forth in paragraph (d)(2) of this section equals the equivalent dollar amount of two hours of the salary of the person performing the search, the Authority, the General Counsel, the Panel, or the IG will begin assessing charges for the computer search. No search or review fees will be charged for a quarter-hour period unless more than half of that period is required for search or review.

(2) The Authority, the General Counsel, the Panel, or the IG will not charge fees to any requester, including commercial-use requesters, if the cost of collecting the fee would be equal to or greater than the fee itself.

(3) As provided in § 2411.8(c)(5), the Authority, the General Counsel, the Panel, or the IG will not charge search fees (or duplication fees if the requester is an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media, as described in this section), when the time limits are not met.

(4)(i) The Authority, the General Counsel, the Panel, or the IG will provide documents without charge or at reduced charges if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and is not primarily in the commercial interest of the requester.

(ii) In determining whether disclosure is in the “public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government” under paragraph (b)(4)(i) of this section, the Authority, the General Counsel, the Panel, and the IG will consider the following factors:

(A) *The subject of the request.* The subject of the requested records must concern identifiable operations or activities of the Federal government, with a connection that is direct and clear, not remote or attenuated;

(B) *The informative value of the information to be disclosed.* The disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be “likely to contribute” to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, would not be as likely to contribute to such understanding where nothing new would be added to the public’s understanding;

(C) *The contribution to an understanding of the subject by the general public likely to result from disclosure.* The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area and his or her ability and intention to effectively convey information to the public shall be considered. It shall be presumed that a representative of the news media will satisfy this consideration; and

(D) *The significance of the contribution to the public understanding.* The public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent. The Authority, the General Counsel, the Panel, and the IG shall not make value judgments about whether information that would contribute significantly to public understanding of the operations or activities of the government is "important" enough to be made public.

(iii) In determining whether disclosure "is not primarily in the commercial interest of the requester" under paragraph (b)(4)(i) of this section, the Authority, the General Counsel, the Panel, and the IG will consider the following factors:

(A) *The existence and magnitude of a commercial interest.*

The processing agency component will identify any commercial interest of the requester (with reference to the definition of

“commercial use” in paragraph (a)(5) of this section), or of any person on whose behalf the requester may be acting, that would be furthered by the requested disclosure. Requesters shall be given an opportunity in the administrative process to provide explanatory information regarding this consideration; and,

(B) *The primary interest in disclosure.* A fee waiver or reduction is justified where the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure. The Authority, the General Counsel, the Panel, and the IG ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return shall not be presumed to primarily serve the public interest.

(iv) A request for a fee waiver based on the public interest under paragraph (b)(4)(i) of this section must address these factors as they apply to the request for records in order to be considered by the Authority, the General Counsel, the Panel, or the IG.

(v) Requests for a waiver or reduction of fees should be made when the request is first submitted to the Authority, the General Counsel, the Panel, or the IG. A requester may submit a fee-waiver request at a

later time so long as the underlying record request is pending or on administrative appeal. When a requester who has committed to pay fees subsequently asks for a waiver of those fees, and that waiver is denied, the requester must pay any costs incurred up to the date on which the fee-waiver request was received.

(vi) When only some of the records to be released satisfy the requirements for a waiver of fees, a waiver shall be granted for those records.

(c) ***

(2) A request for documents from an educational or non-commercial scientific institution will be charged for the cost of duplication alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, requesters must show that the request is being made under the auspices of a qualifying institution and that the records are not sought for a commercial use, but are sought in furtherance of scholarly (if the request is from an educational institution) or scientific (if the request is from a non-commercial scientific institution) research.

(3) The Authority, the General Counsel, the Panel, or the IG shall provide documents to requesters who are representatives of the news media for the cost of duplication alone, excluding charges for the first 100 pages.

(4) The Authority, the General Counsel, the Panel, or the IG shall charge requesters who do not fit into any of the categories of this section fees that recover the full direct cost of searching for and duplicating records that are

responsive to the request, except that the first 100 pages of duplication and the first two hours of search time shall be furnished without charge. Requests from record subjects for records about themselves filed in Authority, General Counsel, Panel, or IG systems of records will continue to be treated under the fee provisions of the Privacy Act of 1974, which permits fees only for duplication.

(d) ***

(2) *Computer searches for records.* The actual direct cost of providing the service, including the cost of operating computers and other electronic equipment, and the salary (i.e., basic pay plus 16 percent of that rate to cover benefits) of the employee conducting the search.

(3) *Review of records.* The salary rate (i.e., basic pay plus 16 percent of that rate to cover benefits) of the employee(s) conducting the review. This charge applies only to requesters who are seeking documents for commercial use, and only to the review necessary at the initial administrative level to determine the applicability of any relevant FOIA exemptions, and not at the administrative-appeal level of an exemption already applied.

(4) *Duplication of records.* Twenty-five cents per page for paper-copy duplication of documents, which the Authority, the General Counsel, the Panel, and the IG have determined is the reasonable direct cost of making such copies, taking into account the average salary of the operator and the cost of the duplication machinery. For copies of records produced on tapes, disks, or other media, the Authority, the General Counsel, the Panel, or the IG shall charge the actual cost of production, including operator time. When paper documents must

be scanned in order to comply with a requester's preference to receive the records in an electronic format, the requester shall pay the direct costs associated with scanning those materials, including operator time. For all other forms of duplication, the Authority, the General Counsel, the Panel, and the IG will charge the direct costs, including operator time.

(5) *Forwarding material to destination.* Postage, insurance, and special fees will be charged on an actual-cost basis.

(e) *Aggregating requests.* When the Authority, the General Counsel, the Panel, or the IG reasonably believes that a requester or group of requesters is attempting to break a request down into a series of requests for the purpose of evading the assessment of fees, the Authority, the General Counsel, the Panel, or the IG will aggregate any such requests and charge accordingly.

(f) *Charging interest.* Interest at the rate prescribed in 31 U.S.C. 3717 may be charged to those requesters who fail to pay fees charged, beginning on the 31st day following the billing date. Receipt of a fee by the Authority, the General Counsel, the Panel, or the IG, whether processed or not, will stay the accrual of interest.

(g) *Advance payments.* The Authority, the General Counsel, the Panel, or the IG will not require a requester to make an advance payment, i.e., payment before work is commenced or continued on a request, unless:

(1) The Authority, the General Counsel, the Panel, or the IG estimates or determines that allowable charges that a requester may be required to pay are likely to exceed \$250. In those circumstances, the Authority, the General Counsel, the Panel, or the IG will notify the requester of the likely cost and obtain

satisfactory assurance of full payment, where the requester has a history of prompt payment of FOIA fees, or require an advance payment of an amount up to the full estimated charges in the case of requesters with no history of payment; or

(2) A requester has previously failed to pay a fee charged in a timely fashion (i.e., within 30 days of the date of the billing), in which case the Authority, the General Counsel, the Panel, or the IG requires the requester to pay the full amount owed plus any applicable interest, as provided in this section, or demonstrate that the requester has, in fact, paid the fee, and to make an advance payment of the full amount of the estimated fee before the agency begins to process a new request or a pending request from that requester. When the Authority, the General Counsel, the Panel, or the IG has a reasonable basis to believe that a requester has misrepresented his or her identity in order to avoid paying outstanding fees, it may require that the requester provide proof of identity. When the Authority, the General Counsel, the Panel, or the IG acts under paragraph (g)(1) or (2) of this section, the administrative time limits prescribed in subsection (a)(6) of the FOIA (i.e., 20 working days from receipt of initial requests and 20 working days from receipt of appeals from initial denial, plus permissible extension of these time limits) will begin only after the Authority, the General Counsel, the Panel, or the IG has received fee payments described in this section. If the requester does not pay the advance payment within 30 calendar days after the date of the fee determination, the request will be closed.

(h) When a person other than a party to a proceeding before the FLRA makes a request for a copy of a transcript or recording of the proceeding, the Authority, the

General Counsel, the Panel, or the IG, as appropriate, will handle the request under this part.

(j) The fee schedule of this section does not apply to fees charged under any statute that specifically requires the Authority, the General Counsel, the Panel, or the IG to set and collect fees for particular types of records. In instances in which records responsive to a request are subject to a statutorily based fee-schedule program, the Authority, the General Counsel, the Panel, or the IG will inform the requester of the contact information for that program.

15. Revise § 2411.14 to read as follows.

§ 2411.14 Record retention and preservation.

The Authority, the General Counsel, the Panel, and the IG shall preserve all correspondence pertaining to the requests that it receives under this subpart, as well as copies of all requested records, until such time as disposition or destruction is authorized by title 44 of the United States Code or the National Archives and Records Administration's General Records Schedule 14. Records will not be disposed of while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

16. Revise § 2411.15 to read as follows:

§ 2411.15 Annual report.

Each year, on or around February 1, as requested by the Department of Justice's Office of Information Policy, the Chief FOIA Officer of the FLRA shall submit a report of the activities of the Authority, the General Counsel, the Panel, and the IG with regard to public information requests during the preceding fiscal year to the Attorney General of

the United States and the Director of the OGIS. The report shall include those matters required by 5 U.S.C. 552(e), and it shall be made available electronically. The Chief FOIA Officer of the FLRA shall make each such report available for public inspection in an electronic format. In addition, the Chief FOIA Officer of the FLRA shall make the raw statistical data used in each report available in a timely manner for public inspection in an electronic format, which shall be available –

- (a) Without charge, license, or registration requirement;
- (b) In an aggregated, searchable format; and
- (c) In a format that may be downloaded in bulk.

Dated: December 20, 2016

Carol Waller Pope

Chairman

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